

NEIL ABERCROMBIE GOVERNOR

BRIAN SCHATZ

STATE OF HAWAII OFFICE OF THE DIRECTOR DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

OF COMMERCE AND CONSUMER AFFAIRS

335 MERCHANT STREET, ROOM 310

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KEALI'1 S. LOPEZ

DIRECTOR

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TO THE HOUSE COMMITTEE ON CONSUMER PROTECTION AND COMMERCE

AND THE HOUSE COMMITTEE ON JUDICIARY

TWENTY-SIXTH LEGISLATURE Regular Session of 2012

Wednesday, January 25, 2012 2:00 p.m.

TESTIMONY IN SUPPORT OF HB 1875: RELATING TO FORECLOSURES

TO THE HONORABLE ROBERT HERKES AND GILBERT S.C. KEITH-AGARAN, CHAIRS, AND MEMBERS OF THEIR COMMITTEES:

The Department of Commerce and Consumer Affairs ("DCCA") appreciates the opportunity to testify in support of HB 1875. My name is Everett Kaneshige, Deputy Director of DCCA. I am the chairperson of the Mortgage Foreclosure Task Force ("MFTF") that drafted the proposed amendments included in HB 1875.

After the Regular Session of 2011, there were significant changes in the membership and leadership of the MFTF and, in light of the major changes made by Act 48, SLH 2011, the necessity of doing a "comprehensive evaluation of Hawaii's mortgage foreclosure laws", as found by the Legislature in Act 162, SLH 2010 was all the more

The Honorable Robert Herkes
The Honorable Gilbert S.C. Keith-Agaran
and Members of their Committees
Testimony of Everett S. Kaneshige, Deputy Director, DCCA
Page 2

relevant. The methodology for review and discussion of HRS Chapter 667, associated mortgage servicer statutes in HRS Chapter 454M, and related association lien foreclosure statutes in HRS Chapters 421J and 514B was revised to provide for maximum discussion, while facilitating the Legislative Reference Bureau's ("LRB") task of compiling the proposed amendments into bill format, and allowing the MFTF members to view each proposed amendment within the context of HRS Chapter 667, generally, before having to take a position for or against the proposed amendments. As in the year previous, Task Force members were assigned to investigative groups according to their expertise and with an eye toward maintaining the balance of interests within the Task Force as a whole. The investigative groups submitted their proposed amendments to the Task Force for inclusion in the LRB draft legislation, followed by a final vote to confirm their inclusion in the proposed legislation what is now HB 1875. This methodology was followed in order to obtain consensus and compromise between the disparate interests of the stakeholders groups represented on the MFTF.

Wherever possible the MFTF strove to avoid making policy judgments about the nonjudicial foreclosure law, but instead focused on streamlining the process enacted by the Legislature, and trying to bring to the Legislature's vision of a functional and fair nonjudicial foreclosure process to fruition. The findings and final recommendations of the MFTF focus on addressing nonjudicial foreclosure by condominium and homeowner associations, revising the Mortgage Foreclosure Dispute Resolution Program to protect personal information and procedural issues, simplifying definitions and addressing inconsistencies in terminology. A key provision proposed by the MFTF would amend

The Honorable Robert Herkes
The Honorable Gilbert S.C. Keith-Agaran
and Members of their Committees
Testimony of Everett S. Kaneshige, Deputy Director, DCCA
Page 2

HRS §667-60 to balance protecting consumers' rights, while providing guidance for title insurers, lenders and their representatives, and avoiding penalizing them for circumstances outside of their control (HB 1875, Section 33). This last issue was particularly important, as HRS §667-60 was widely cited by lender and title insurance stakeholders as a primary reason as to why the nonjudicial foreclosure process under Part II of HRS Chapter 667 has gone unused in the wake of Act 48, SLH 2011. This diversion of foreclosure cases to the judicial foreclosure track is evidenced in monthly statistics on judicial foreclosure filings presented by the Judiciary to the MFTF (included in the MFTF Final Report), and the emergence of a meaningful compromise on the issue is a major milestone for the MFTF and its members.

Thank you for this opportunity to testify in support of HB 1875, DCCA recommends that it be passed, unamended. I will be happy to answer any questions that the Chairpersons or members of the Committees may have.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent:

Sunday, January 22, 2012 5:06 PM

To:

CPCtestimony

Cc:

khedberg@hawaii.rr.com

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Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Karl Hedberg Organization: Individual

E-mail: khedberg@hawaii.rr.com

Submitted on: 1/22/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Sunday, January 22, 2012 5:27 PM

To: CPCtestimony

Cc: joanipt@hawaii.rr.com

Categories: Yellow Category

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Joanne Taylor Organization: Individual E-mail: joanipt@hawaii.rr.com

Submitted on: 1/22/2012

Comments:

I have served 29 years on the BOD for Marco Polo AOAO and 15 as tresurer. The budget process for a AOAO, nonprofit, includes collecting funds for the current year operations and funding the state mandated lang range reserve funds. If an effort to minimize the financial impact on the homeowners, fees are kept to the minimum to fulfill the funding requirements. The funding plan is based on all association members paying their fees in a timely manner. If members fail to comply, a rapid, fair collection process is needed to prevent the current members from having to coverr the cost of delinquent owners. This bill fails to provice such relief.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Sunday, January 22, 2012 6:59 PM

To: CPCtestimony
Cc: BGRock24@aol.com
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Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Willard W. Gusler Jr

Organization: Individual E-mail: BGRock24@aol.com Submitted on: 1/22/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent:

Monday, January 23, 2012 8:12 AM

To:

CPCtestimony

Cc:

patriot1946@live.com

Categories: Yellow Category

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: James Kingery

Organization: Pacific Village & amp; Annex

E-mail: patriot1946@live.com

Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 1:39 PM

To:

CPCtestimony koreily9@gmail.com

Cc: Subject:

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Kathleen O'Reilly

Organization: Individual E-mail: <u>koreily9@gmail.com</u>
Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 1:52 PM

To: Cc: CPCtestimony darleelas@aol.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Lee & amp; Darlene Laster

Organization: Individual E-mail: darleelas@aol.com
Submitted on: 1/23/2012

Comments:

Please prepare a separate Bill for Condos as we members of the AOAO as there are no funds.....especially \$10,000...... to try to collect the maintenance fees that other members of the AOAO have not paid. Ours is not a business but only an Association that pool our money to operate and make sure there are sufficient funds to repair and refurbish our condo home. Thank you.

From:

mailinglist@capitol.hawaii.gov

Sent: Monday, January 23, 2012 1:52 PM

To:

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Cc: Subject: orion77@hawaiiantel.net

F-91---- 11-- F1-

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Randall Weikert

Organization: AOAO Mauna Luan, Inc.

E-mail: orion77@hawaiiantel.net

Submitted on: 1/23/2012



TEL: 808-524-5161 FAX: 808-521-4120 ADDRESS: 1000 Bishop Street, Suite 3018 Honalulu, HI 96813-4203

Presentation of the Committees on Commerce and Consumer Protection and Judiciary Wednesday, January 25, 2012 at 2:00 p.m.
Testimony on HB 1875 Relating to Foreclosures

In Opposition

TO: The Honorable Chairs Robert N. Herkes and Gilbert S.C. Keith-Agaran The Honorable Vice Chairs Ryan I. Yamane and Karl Rhoads Members of the Committees

I am Gary Fujitani, Executive Director of the Hawaii Bankers Association (HBA), testifying in opposition to HB 1875. HBA is the trade organization that represents all FDIC insured depository institutions doing business in Hawaii.

This bill implements the 2011 recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosures law and related issues affecting homeowner association liens and the collection of unpaid assessments.

We appreciate the attempt of the Mortgage Foreclosure Task Force to make Act 48 workable for all parties by offering a few improvements to add clarity to the law. However, the Task Force recommended changes to Act 48 may not be sufficient to induce Government Sponsored Enterprises (GSEs) such as Fannie Mae and Freddie Mac and lenders for their portfolio loans to use the nonjudicial foreclose (NJF) process without further changes.

The Hawaii Credit Union League, Hawaii Financial Services Association and Hawaii Bankers Association "minority reports" contained in the task force report outlines additional issues that need to be address in the nonjudicial foreclosure law. A copy of the HBA "minority report" is attached.

As quote from the HBA minority report follows:

"If it is the Legislature's intent to end all nonjudicial foreclosures, they have accomplished their intent. If the Legislature, however, recognizes that there is a place and need for nonjudicial foreclosures in certain situations, Section 667-AC must be repealed."

We believe there is a need for the nonjudicial foreclosure process for <u>non-owner occupant residential</u> mortgage loans (investor loans, vacant land, etc.). A streamlined NJF for non-owner occupant residential loans will reduce the backlog of pending foreclosures, allow these properties to be made available for sale and occupancy sooner and ease the burden on the Judiciary by not having to hear these cases.

Thank you for the opportunity to provide our testimony.

Gary Y. Fujitani Executive Director

Attachment

HAWAII BANKERS ASSOCIATION Statement Regarding Amendments to Act 48 Recommended by the Mortgage Foreclosure Task Force December 14, 2011

The Hawaii Bankers Association (HBA) appreciates the opportunity to participate in the 2011 meetings of the Mortgage Foreclosure Task Force. This year's meetings focused on making recommendations to clarify and improve Act 48 following its enactment during the 2011 Legislative Session. HBA participated in the Act 48 Investigative Group which reviewed the text of Act 48 and recommended revisions to address concerns and issues raised by both consumer and lender groups.

Numerous revisions to Act 48 were recommended by HBA which were not included in the final recommended revisions approved by the Task Force. Nevertheless, HBA continues to believe such revisions are necessary to allow Act 48 to be implemented and used correctly and effectively by consumers and financial institutions alike. In order for the Legislature and any reviewer of the Task Force's recommended revisions to get an accurate and complete understanding of the divergent views expressed at the Task Force and Investigative Group meetings, HBA presents this Statement.

- 1. <u>Unfair and Deceptive Act or Practice</u>. Section 667-AC (new HRS Section 667-60) makes any violation of Chapter 667 by a foreclosing mortgagee an unfair or deceptive act or practice (UDAP) under HRS Section 480-2. By enacting this legislation, the proof requirement that a claimant must establish that an act was "unfair and deceptive" is removed. Any violation of Chapter 667, no matter how miniscule, becomes an unfair and deceptive act or practice entitling the claimant to certain remedies and damages, the worst of which is the voiding of the contract or agreement violating Section 480-2. See HRS Section 480-12. Additionally, treble damages and all attorneys' fees and costs for the claimant under Section 480-13, and the imposition of a fine by the State for every day that a violation is found under Section 480-3.1, makes it extremely unlikely that any foreclosing lender will risk the penal damages and fines imposed by Act 48. If it is the Legislature's intent to end all non-judicial foreclosures, they have accomplished their intent. If the Legislature, however, recognizes that there is a place and need for non-judicial foreclosures in certain situations, Section 667-AC must be repealed. Other measures are available to ensure compliance with Chapter 667 that would not impose such harsh penalties which, at this point, have rendered the remedial purposes of Act 48 completely unworkable and unused.
- 2. Prohibited Conduct. Section 667-Y (new HRS Section 667-56) prohibits a foreclosing mortgagee from engaging in certain enumerated practices. While items (1) through (4) of the section are easily ascertainable and avoidable, items (5) through (7) are vague, ambiguous and ripe for potential unknowing violation. Item (5) attempts to give a potential short sale that is agreed to at or around the time of the non-judicial foreclosure sale priority over the foreclosure so long as the sales price is at least 5% greater than the foreclosure sale price. Recognizing that a sales commission of 6% on the short sale would wipe out the entire 5% increased sales price, the Task Force agreed to increase this percentage to at least 10%. However, this does not address other conditions in the short sale that might have prevented the lender from approving the short sale in the first place, such as payment of other debts of the seller that effectively reduce the amount of the payoff to the lender. This effectively places unsecured creditors ahead of the foreclosing lender and other lien holders. This would not, and should not be acceptable and the foreclosing lender should not be forced to accept it. As for items (6) and (7), there is no definition to determine what are "bona fide loan modification negotiations" or "being evaluated for consideration for entry into a federal loan modification program." Moreover, in either instance, if a borrower proposes numerous loan modifications or applications for entry into a loan modification program just before closing of a foreclosure sale, must a foreclosing lender, because of the potential UDAP violation, continue to postpone the closing of the sale to deal with each proposal or application, even if such vary only slightly from previously denied proposals or applications? Section 667-Y must be amended to provide clarity to these items and allow the foreclosing lender to end negotiations at some point.
- 3. Oral Representations. Section 667-AB (new HRS Section 667-59) binds a foreclosing mortgagee to all agreements, obligations, representation or inducements made by its agents, employees, servicers, etc. Besides the obvious proof problems and violation of the parol evidence rule, this section is directly counter to the express stated provisions in virtually all notes and mortgages which require any revision to the existing terms to be in writing. Additionally, this section is potentially ripe for abuse by savvy borrowers who could elicit, through manipulation or misrepresentation, representations from unsuspecting employees of the lender, unbeknownst to the responsible employee of the lender handling the loan.
- 4. <u>Authority</u>. Section 667-J (new HRS Section 667-80) must be amended to permit mainland lenders to attend during reasonable business hours where they are situated. Additionally, provision must be made to accommodate situations where approval of a loan modification requires more than one approval. For example, in instances where mortgage insurance is in place, the insurer will be required to approve the modification in addition to the lender.
- 5. <u>Public Information Disclosure</u>. Existing Section 667-41, while improved tremendously by the proposed amendment approved by the Task Force, still potentially applies to certain commercial loans in which residential property is taken as collateral. HBA doubts that the Legislature intended this informational notice to apply to commercial borrowers and applicants and requests that the Legislature, in addition to adopting the proposed revisions made the Task Force, also enact a further amendment to specify that such notice requirement applies only to consumer, residential mortgage loans.

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Monday, January 23, 2012 10:33 AM

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Steve Glanstein

Organization:

E-mail: steveghi@gmail.com
Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 11:37 AM

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bebe24k@hotmail.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Elizabeth S. Shoup

Organization: Individual

E-mail: bebe24k@hotmail.com

Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 12:06 PM

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kanani@certifiedhawaii.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Kanani Kealoha-Faleafine

Organization:

E-mail: kanani@certifiedhawaii.com

Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

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brenda@certifiedhawaii.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Brenda LeClair

Organization: Individual

E-mail: brenda@certifiedhawaii.com

Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 12:14 PM

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laurrie@certifiedhawaii.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Laurrie Zimmerman

Organization: Individual

E-mail: laurrie@certifiedhawaii.com

Submitted on: 1/23/2012

Comments:

AOAO are not mortgage companies, are non profit and do not choose who to charge and how much to charge each individual HO as a mortgage company. We are eating enough fees already and making it more difficult on thos that do pay on time and then have to make up for the shortfall of the delinquencies and foreclosures.

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 12:17 PM

To:

CPCtestimony

Cc:

roy@certifiedhawaii.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Roy Dela Cruz

Organization: Certified Hawaii, Inc.

E-mail: roy@certifiedhawaii.com

Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 12:17 PM

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lisab@certifiedhawaii.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Lisa Bortle Organization: Individual

E-mail: lisab@certifiedhawaii.com

Submitted on: 1/23/2012

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 12:26 PM

To:

CPCtestimony

Cc:

les@certifiedhawaii.com

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Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Les Fernandez

Organization: Individual

E-mail: les@certifiedhawaii.com

Submitted on: 1/23/2012

HOUSE OR REPRESENTATIVES COMMITTEE ON CONSUMER PROTECTION & COMMERCE Rep. Robert N. Herkes, Chair

COMMITTEE ON JUDICIARY Rep. Gilbert S.C. Keith-Agaran, Chair

DATE:

Wednesday, January 25, 2012

TIME:

2:00 p.m.

PLACE:

Conference Room 325

State Capitol

415 South Beretania Street

Dear Chairs Keith-Agaran and Herkes:

My name is Jane Sugimura. John Morris and I are submitting this testimony in favor of House Bill 1875, which was developed by the members of the Legislature's Mortgage Foreclosure Task Force ("MFTF"). In particular, I am testifying on the provisions recommended by the MFTF's Condominium-Homeowner Association Working Group on which Mr. Morris and I served in 2011.

Those provisions focused on: improving collection processes for homeowner associations organized under the nonprofit corporations law (chapter 414D, HRS) and chapter 421J, HRS; developing procedures for non-judicial foreclosures by <u>all</u> homeowner associations; and making technical changes to some of the provisions of act 48 that relate to chapter 414D-421J associations.

Changes For Chapter 414D-421 Associations

One major focus of the Condominium-Homeowner Association Working Group was to provide associations organized under chapters 414D and 421J with the same protections and procedures for collecting delinquencies that have been provided to condominium associations during the last two decades. First, Section 667-A in Section 2 of House Bill 1875 proposes to add most of the provisions from section 514B-146 of the condominium law (appropriately revised) to chapter 421J. As a result of these changes, chapter 414D-421J associations will receive:

- Lien rights similar to those of condominium associations (although condominium associations will retain their priority).
- The same right as condominium associations to conduct nonjudicial foreclosures;
- The same right as condominium associations to terminate common services and utilities supplied by the association to delinquent owners;
- The same right of condominium associations to begin billing purchasers in lender foreclosure auctions, even if the purchasers delay in taking title to the unit they purchased in foreclosure (This provision was added to the condominium law more than a decade

ago to prevent a lender from buying a unit at foreclosure and then sitting on the deed, to avoid paying maintenance fees, until a new purchaser can be found — thereby evading the obligation to pay maintenance fees as owner).

• The same right that condominium associations have had for more than a decade to claim six months of maintenance fees or \$3,600 at the end of any foreclosure (as part of act 48, the Legislature temporarily extended that lien right to 12 months or \$7,200 in 2011, until 2014, and that temporary increase is also reflected in HB 1875).

Since these rights have existed in the condominium law for at least a decade, extending them to chapter 414D-421J associations is only fair because those associations serve many of the same functions as condominium associations. Moreover, while some chapter 414D-421J associations are comprised of single-family homes and have relatively small monthly dues, other chapter 421J associations are organized as townhome-style projects. Those associations have the same high monthly maintenance fees as condominium associations. Therefore, any delinquency for them can have just as severe an impact as on any condominium association.

Finally, the Condominium-Homeowner Association Working Group also added language to section 667-A to provide that: (i) <u>recorded</u> liens of chapter 414D-421J associations will expire if not enforced within two years; and (ii) no liens can be recorded against an owner's property if they are <u>solely</u> for fines, legal fees, or late fees and do not include some maintenance fees. Both provisions were added to prevent possible abuse of lien rights by chapter 414D-421J associations.

[Note: Similar language was added to the corresponding sections in the condominium law, see sections 6 and 7 on pages 45 though 51 of HB 1875.]

At the same time, the "pay first, dispute later" provisions that have existed in the condominium law for more than two decades were added to section 667-A. The purpose of the provisions is to encourage homeowners to pay disputed amounts to their associations, without giving up their right to contest those disputed amounts at a later date. In that way, owners avoid incurring unnecessary legal fees in fighting with the association and its attorney, and once payment is made, the owners can dispute whether it is owed at their leisure.

Section 667-B adds the provisions that have existed in the condominium law for more than a decade that will permit chapter 414D-421J associations to demand rent from the tenant of a delinquent owner in an appropriate case.

2) Nonjudicial foreclosures by condominium and other homeowner associations

Section 3, pages 19 to 44 of HB 1875, proposes to add a new part to chapter 667 dealing solely with condominium and other homeowner association nonjudicial foreclosures. Then, they will not have to use the part intended for lenders (Part II). [The Condominium-Homeowner Association Working Group ultimately concluded that it was better to have a single, separate part for homeowner association nonjudicial foreclosures in chapter 667, instead of separate nonjudicial foreclosure sections in 421] and in both condominium laws, 514A and 514B.]

Act 48 (SLH 2011) had an adverse impact on all homeowner associations by severely curtailing the use of one of their most effective remedies for nonpayment of maintenance fees and association dues - nonjudicial foreclosure. In attempting to control nonjudicial foreclosures by <u>lenders</u>, Act 48 essentially had the same effect on nonjudicial foreclosures by <u>associations</u> (since condominium associations have traditionally used the same foreclosure statute as lenders, part I – and since May of last year, part II – of chapter 667).

In addition, non-condominium homeowner associations operating under chapters 414D-421J - who <u>had</u> traditionally used part I of chapter 667 to conduct nonjudicial foreclosures - were frozen out of the nonjudicial foreclosure process entirely by the wording of section 667-40 of part II of chapter 667.

The starting point for the Condominium-Homeowner Association Working Group's proposal was part II of chapter 667, approved by the Legislature last year, which has been adapted in this case for condominium and other homeowner associations. As a result, the references to notes, mortgages, lenders, mortgagees, and mortgage from part II of chapter 667 have been mostly eliminated. Nevertheless, many of the same part II procedures continue on in the Working Group's proposed nonjudicial foreclosure law for homeowner associations.

One major change by the Condominium-Homeowner Association Working Group, however, is the incorporation of Section 667-T (now 667-21.6) from act 48 into the proposal. (That section requires homeowner associations to give an owner 60 days to propose a payment plan.) Since the notice of intention to foreclose under part II requires a homeowner association to give the owner 60 days to respond anyway, there seemed to be no reason to have two 60-day periods run consecutively. Therefore, the Condominium-Homeowner Association Working Group decided it would be more efficient to fold: (i) the 60 days for the payment plan under section 667-T, into (ii) the 60 days for the notice of intention to foreclose under the group's proposed new part for homeowner association foreclosures. As a result, section 667-T from act 48 was eliminated and incorporated into the group's proposed nonjudicial foreclosure law for homeowner associations (as subsection 667-A(c) on page 23 of HB 1875).

Nonjudicial foreclosures are important to homeowner associations because they are considerably cheaper and quicker than judicial foreclosures. Homeowner associations in a financial downturn have little chance of realizing any sales proceeds from the sale of a foreclosed unit. Instead—because the unit is usually worth less than its mortgage and, in almost all cases, the mortgage on the unit is ahead of the association's lien—there will be no sales proceeds from the sale of the unit in an association foreclosure. Therefore, having the ability to conduct a foreclosure as inexpensively as possible is very important for homeowner associations.

For example, no one who understands the process will buy a unit in an association's foreclosure if the unit has a mortgage of \$400,000 but is worth only \$300,000. In that situation, the mortgage company would lose \$100,000 if it held its own foreclosure sale, and the association's claim is usually behind the mortgage company's claim. Therefore, a judicial foreclosure provides little benefit to an association.

Specifically, there is little point in an association spending \$9,000 -\$11,000 and 12 months or more to conduct a <u>judicial</u> foreclosure of the unit when it can spend \$4,500 -\$5,500 and 5 to 6 months to conduct a <u>nonjudicial</u> foreclosure with essentially the same result - buying the unit for a nominal amount. Spending more than twice as much and taking twice as long to achieve the same result provides little benefit to an association.

In addition, under Hawaii law, if the lender's lien is in first position and the association's is in second, the association's sale must typically be made <u>subject to</u> the prior mortgage (i.e., the mortgage remains on the unit). This means once the association purchases the unit, the best it can usually do is rent out the unit until the mortgage company decides to foreclose. A unit worth \$300,000 subject to a mortgage of \$400,000 is essentially impossible to sell (because, in the example above, when the lender's priority claim is taken into account, the unit is worth minus \$100,000 before the association's claim is even considered!).

Some associations have been able to buy and rent out units successfully, thereby generating income – or at least stopping the bleeding – while they wait for the lender to foreclose. Moreover, being able to tell a delinquent owner that his unit will be nonjudicially foreclosed and sold within 5-6 months helps concentrate the owner's attention on paying his delinquency. Therefore, while nonjudicial foreclosure is not the best possible remedy for homeowner associations, it is far better than judicial foreclosure in most cases.

Exemptions For Chapter 421]

Finally, in what really amounts to a housekeeping measure, the Condominium-Homeowner Association Working Group made amendments that are intended to specifically exempt associations organized under chapters 414D-421J from: (i) the requirements of the mortgage dispute resolution program (see Section 35); and (ii) the process that allows an owner occupant to convert a nonjudicial foreclosure to a judicial foreclosure (see Section 26). While act 48 did exempt condominium associations from both processes, it inadvertently seemed to suggest that associations organized under chapters 414D-421J could be subject to both sets of requirements.

Thank you for this opportunity to testify on behalf of the Condominium-Homeowner Association Working Group of the Mortgage Foreclosure Task Force.

M W

John A. Morris Yu⁄iko J. Sugimura

From:

mailinglist@capitol.hawaii.gov

Sent:

Monday, January 23, 2012 12:43 PM

To:

CPCtestimony

Cc:

g.vanvleet@heartwoodpacific.com

Subject:

Testimony for HB1875 on 1/25/2012 2:00:00 PM

Follow Up Flag:

Follow up

Flag Status:

Flagged

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Ginger Van Vleet

Organization: Individual

E-mail: q.vanvleet@heartwoodpacific.com

Submitted on: 1/23/2012

Comments:

I strongly oppose HB 1875

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 9:21 AM

To: CPCtestimony

Cc: teramotob002@hawaii.rr.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Bob Teramoto

Organization: AOAO The Coconut Plantation

E-mail: teramotob002@hawaii.rr.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 10:13 AM

To: CPCtestimony

Cc: DMorris13@hawaii.rr.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Derry Morris Organization: Individual

E-mail: DMorris13@hawaii.rr.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 10:14 AM

To: CPCtestimony

Cc: eappleby@hotmail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Edward R. Appleby

Organization: Individual E-mail: eappleby@hotmail.com Submitted on: 1/24/2012

Comments:

Our HOA is being crippled by delinquent absentee owners knowing they can thumb their nose at foreclosure proceedings and collections. We are up to about \$100,000 in delinquent maintenance fees that the other owners are having to absorb, and it's only getting worse. This law is for deadbeats, not people who sunk their life savings and total manageable income into their homes.

HAWAII FIRST, INC. HB 1875 OPPOSITION

Community associations which in include condominiums, homeowner associations, and planned unit development, continue to be victims in proposed legislation regarding **Lender (emphasis added)** problems with delinquent mortgages. We recognize needs to correct the law but the task force's emphasis was related to "Lender" issues and ignored the unintended adverse consequences for community associations.

Community associations have no say nor do they generate any profits from the natural buying, selling, and mortgaging of real estate between Lenders and Buyers. Community associations simply collect at no profit money from homeowners to pay the basic necessities such as water, sewer, maintenance costs, and other common expenses of the association. It should be obvious that when one owner does not pay his/her share that the deficit created by that non payment is passed on to the other paying homeowners imposing a further hardship on these innocent homeowners in these difficult times. Often homeowners who live in a community association stop paying for their basic necessities provided by the association while they attempt to negotiate a solution with the Lender. This is patently unfair to the other homeowners and places an unfair burden on them.

The task force failed to adequately address the affect on community associations. Its proposed procedures add 101 additional days or a total of 176 total days under optimum conditions for an association to foreclose for non payment of its common expenses as demonstrated in the attached flow chart. Current legislation provides a \$7,200 cap on recovery of association's fees paid only after the lender forecloses and it sells to a new purchaser (months or years later).

The process in HB 1875 severely and unfairly restricts an association from protecting its members from the adverse effect created by a homeowner who does not pay his/her share. Community Associations Institute opposes HB1875.

Non-Judicial Foreclosure Process Impact on Non-Profit Condominium Associations 1

CURRENT PROCESS			PROPOSED		
Day 1	Demand letter from	· · ·	PROCESS	15 11 11	
(but 2 to 3	. [Day 1	Demand letter	
•	Attorney to Owner		(but 2 to 3 months	from Attorney to	
months			delinquent)	Owner	
delinquent)			· · · · · · · · · · · · · · · · · · ·		
Day 35	Prep of Lien if Owner		Day 35	(same)	
	does not respond				
Day 45	Prep of & Send Post Lien		Day 45	(same)	
	Demand letter to Owner				
Day 60	Notice of Default and	Order Title	Day 60	NDIF Prepared;	
	Intent to Foreclose	Report – Costs		attempt service at	
	("NDIF") Prepared;	Approx. \$250.00;		Subject Property;	
	Personal Service	Approx. \$250.00		three attempts;	
	attempted on Owner and	for filing fees		mail and post at	
	deliver to all other Parties	and service costs		Subject Property;	
	(including Copies to DCCA			deliver to all other	
	and Recordation at			parties	
	Bureau and/or Land				
	Court)				
Day 70	Order Endorsement to		Day 70	(same)	
	Title Report re service of		'	[.	
	NDIF on all Parties				
Day 90	Unable to Personally				
	Serve NDIF - prep and file				
	with Court Request for				
	Service by Certified				
	Mail/Restricted Delivery;			•	
	Attempt Service of NDIF				
	by Restricted Delivery				
Day 111	Unable to Serve by			· · · · · · · · · · · · · · · · · · ·	
	Certified Mail; prepare			•	
	and file with Court				
	Request to Serve by		٠.		
	Publication				
Day 134	Publish NDIF	 	· · · · · · · · · · · · · · · · · · ·	 	
	Service/Notice				
Day 176		<u> </u>	D 7F	D	
Day 1/0	Prep and Publication of		Day 75	Prepare and	
	Auction of Property			Publish Auction of	
	<u> </u>	1	<u> </u>	Property	

 $^{^{\}mathbf{1}}$ Community Associations also need to have the right to foreclose via a Non-judicial Foreclosure

Day 218	Approx. Date of Auction	:	Day 117	Approx. Date Auction
Day 248	Approx. Date of Recording Quit Claim Deed Conveying Unit		Day 131	Approx. Dat Recording O Claim Deed Conveying U
**Approx. 8 to 9 month process if the delinquent Onwer (a) does not		Approximately \$5,000.00 to \$6,000.00 of additional Costs that were never part of Non-	**Approx. 4 to 5 months process	
propose any payment plan; and (b) does not file		Judicial Foreclosure Process		
Bankruptcy (then add 4 to 6 months to the above process or		**Entire Process can now cost the Association \$8,000.00 to \$10,000.00 in		
taking over 1 Year)		attorneys' fees and costs (whereas under prior law this		
		amount would have been <u>one-</u> <u>half</u> and taken <u>about one-third</u>		. '

•

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 2:35 PM

To: CPCtestimony

Cc: Leo@hawaiifirst.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Leonard Tom Organization: Individual E-mail: Leo@hawaiifirst.com Submitted on: 1/23/2012

Comments:

the bill/concept is a disaster! Putting the banks/lenders/primary, secondary ... mortgage holders further ahead of the AOAOs than ACTs 38, 39, 48 did for amounts due (after the Unit conveyed to a third party). Similarly, by virtually eliminating the non-judicial foreclosure option for AOAOs, it further delays the collection process from an Owner who opts to continue to occupy the Unit while NOT paying Maintenance Fees/Reserve Contributions, or the ability of the AOAO to rent a vacant Unit that it has obtained through non-judicial foreclosure to cut some of its losses (until the Lender chooses to pursue a judicial foreclosure). Indirectly, it also fills the wallets and pocketbooks of collection attorneys out of the AOAO's coffers for the AOAO which opts to pursue a judicial foreclosure with the Lender that allows the AOAO to do its dirty work for it (and pay the associated legal bills) rather than (the Lender) pay the Maintenance Fee/Reserve Contributions obtained through a judicial foreclosure.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 2:44 PM

To: CPCtestimony

Cc: ikaika@certifiedhawaii.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Ikaika Pestana Organization: Individual

E-mail: ikaika@certifiedhawaii.com

Submitted on: 1/23/2012

Comments:

In solidarity with the Community Associations Institute I oppose this bill and request that the committee consider the CAI version of the bill instead.

Community and Condo Associations play a key role in providing housing for the states population and any bill that diminishes their ability to collect delinquent maintenance fees and CA dues will hurt the long term sustainability of housing in Hawaii.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 3:15 PM

To: CPCtestimony

Cc: kaipop@sause.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Paul Kaipo Pomaikai

Organization: Individual E-mail: kaipop@sause.com Submitted on: 1/23/2012

Comments:

In solidarity with the Community Associations Institute I oppose this bill and request that the committee consider the CAI version of the bill instead.

Community and Condo Associations play a key role in providing housing for the states population and any bill that diminishes their ability to collect delinquent maintenance fees and CA dues will hurt the long term sustainability of housing in Hawaii.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 4:26 PM

To: CPCtestimony

Cc: joseph.gilmour@wilkes.edu

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Joseph & amp; Patty Gilmour

Organization: Individual

E-mail: joseph.gilmour@wilkes.edu

Submitted on: 1/23/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 4:29 PM

To: CPCtestimony
Cc: akluvo@gmail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Arthur Kluvo Organization: Individual E-mail: akluvo@gmail.com Submitted on: 1/23/2012

Comments:

I am treasurer of AOAO Cathedral Point and I oppose this bill. Please give us a break. We currently have over \$200,000 in delinquent accounts. If this bill passes, it will probably make the matter much worse.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 5:21 PM

To: CPCtestimony

Cc: Glenhilton2@netscape.net

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Glen Hilton Organization: Individual

E-mail: Glenhilton2@netscape.net

Submitted on: 1/23/2012

Comments:

Please consider the position and alternative to HB1875 that protects the interests of Associations of Apartment Owners. When AOAO's have no ability or recourse to collect from owners who don't pay their monthly dues ALL other home owners suffer the costs. They must either pay significantly higher fees to make up for the fees not paid or suffer the consequence of seeing the value of there homes deteriorate when maintenance and services can no longer be provided.

Thank you

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 5:29 PM

To: CPCtestimony

Cc: Beverlyf@gmail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Beverly FeBenito

Organization: Individual E-mail: Beverlyf@gmail.com Submitted on: 1/23/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 6:35 PM

To: CPCtestimony **Cc:** perth@gci.net

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Linda Harter Organization: Kona West Condo

E-mail: perth@gci.net Submitted on: 1/23/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 6:44 PM

To: CPCtestimony

Cc: jade@steadfastpt.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Support Testifier will be present: No Submitted by: Jadine L Brown Organization: Individual E-mail: jade@steadfastpt.com Submitted on: 1/23/2012

Comments:

Thank you for hearing the People and creating Act 48 to protect Hawaii homeowners from unfair practices by financial institutions and to ensure mandatory and transparent mediation/modification as well as ensuring due process during foreclosures. Mainland banks are attempting to bypass our law by filing judicial foreclosures. Despite copious evidence of fraud by the banks, it appears that the Hawaii judiciary is not yet compelled to rule in favor of Hawaiian homeowners, or even hear their arguments in court. We need stronger laws. Please pass HB2033, HB2018, HB2019, HB2020, and HB1875. Thank you again for hearing your People.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 7:05 PM

To: CPCtestimony

Cc: bfaulkner@hmcmgt.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: William Faulkner

Organization: Individual E-mail: bfaulkner@hmcmgt.com

Submitted on: 1/23/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 8:02 PM

To: CPCtestimony
Cc: makaha@ymail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Dale A. Head Organization: Individual E-mail: makaha@ymail.com Submitted on: 1/23/2012

Comments:

I'm writing to express opposition to SB 1875 as the way it is currently written does not address the problem condominium associations face as Act 48 created amazingly difficult and expensive problems for us in collecting from 'deadbeat' investors who fail to pay their assessed maintenance fees. The Act 48 and SB 1875 have created problems for associations which didn't exist until their passage. Act 48 should be abolished and SB 1875 dropped. Thank you.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Monday, January 23, 2012 11:18 PM

To: CPCtestimony

Cc: sandy@torysroofing.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Sandra G. Tory
Organization: Individual

E-mail: sandy@torysroofing.com

Submitted on: 1/23/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 5:12 AM

To: CPCtestimony

Cc: hamiltond008@hawaii.rr.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325
Testifier position: Oppose
Testifier will be present: No

Submitted by: Dale Hamilton Organization: Individual

E-mail: hamiltond008@hawaii.rr.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 8:10 AM

To: CPCtestimony

Cc: mikehawaii3@gmail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Michael Kedell Organization: Individual

E-mail: mikehawaii3@gmail.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 9:04 AM

To: CPCtestimony
Cc: xielevin@aol.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Eugene Levin and Donna Scott

Organization: Individual E-mail: xielevin@aol.com Submitted on: 1/24/2012

Comments:

We support the letter comments of Mr. Philip Nearney of the Hawaii Chapter Community Assn. Institute. The legislature should make it easier, not harder, for individual condo owners who pay their dues, to be able to recover losses from delinquent owners! Otherwise there can be a ripple effect as more owners, faced with higher dues, slip into economic distress, foreclosures, bankruptcies, etc. Please keep the interests of the struggling remaining condo owners in mind as they face the burdens on their associations of these delinquencies!

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 9:07 AM

To: CPCtestimony

Cc: Alex@certifiedhawaii.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Alex Reyes Organization: Individual

E-mail: Alex@certifiedhawaii.com

Submitted on: 1/24/2012



P.O. Box 976 Honolulu, Hawaii 96808

January 23, 2012

Honorable Robert N. Herkes Commerce and Consumer Protection Honorable Gilbert S.C. Keith-Agaran Committee on Judiciary 415 South Beretania Street Honolulu, Hawaii 96813

Re: HB 1875

Dear Chair Herkes, Chair Keith-Agaran and Committee Members:

I chair the CAI Legislative Action Committee. CAI opposes
HB 1875.

CAI has offered an alternative bill which, at the moment, is pending introduction in the House. The bill has been introduced in the Senate as SB 2442.

The focus of this testimony is on the portion of HB 1875 that addresses an alternate power of sale provision for associations. CAI supports the availability of an efficient and effective non-judicial foreclosure remedy for associations.

Associations are non-profit entities that provide essential services and maintain and repair the association premises. They are completely unlike mortgage lenders. Associations do not choose their members or underwrite risk. Association assessments lack a profit component, and other consumers must make up for the defaults of those who do not pay their fair share.

Any non-judicial foreclosure remedy should protect consumers and be a remedy that is likely to be used in appropriate circumstances. The task force proposal suffers from many deficiencies which can reasonably be expected to limit its utility.

Without limitation, there are two poison pills in the proposed alternate power of sale procedure for associations. Section 667-I allows any creditor to credit bid. The lender can always outbid the association, so use of the remedy would mean that the association would incur expense and receive nothing.

Honorable Robert N. Herkes Honorable Gilbert S.C. Keith-Agaran January 23, 2012 Page 2 of 5

Similarly, section 667-K(b) provides for distributing sales proceeds to the lender. Again, the association would incur expense and receive no money. There is little incentive for an association to use such a remedy.

Proponents of the personal service requirement should candidly acknowledge that such a requirement essentially turns a non-judicial process into a judicial process whenever the owner cannot be found for service. That is particularly unfortunate because a significant reason to use a non-judicial process is when the owner has abandoned the unit or is hiding. It is not uncommon for an owner in hiding to nonetheless rent out the unit and receive income while defaulting on the payment obligation to the association.

When a person cannot be found for personal service, the civil procedure rules require compliance with statutes to enable substitute service. Substitute service requires a court order. See, for example, Hawaii Revised Statutes section 634-23 and 634-36.

After failure of personal service, the next step is an attempt to serve by certified mail. The attempt to serve by certified mail is always appropriate, and is otherwise provided for in existing law. It is a largely ineffectual step, though, if someone is dodging service. Service by certified mail is not effective under the civil procedure rules if the owner simply chooses to not sign for the mail.

This leaves **judicial** action to authorize service by publication. Since publication is required in the non-judicial foreclosure context in all events, there should simply be a requirement in Chapter 667 that there be three separate attempts to personally <u>deliver</u> (but <u>not</u> to "serve") the appropriate notice.

The task force fails to adequately account for the probability that substitute service (that is, judicial action) will be required in many cases under its proposal. It further fails to attend to how lengthy service delays will adversely impact the timelines in the task force proposals, to say nothing of the needless and pointless expense. The question of due process can be more than adequately addressed without requiring personal service in the manner provided for in the civil procedure rules.

Honorable Robert N. Herkes Honorable Gilbert S.C. Keith-Agaran January 23, 2012 Page 3 of 5

The open house requirement proposed by the task force makes no sense in the association context. The non-judicial process is frequently used when the owner lacks equity and the association will be the sole bidder at the auction. Please keep in mind that the successful bidder at an association auction takes title subject to the existing mortgage.

No bidders come to an auction for a unit worth \$200,000 when the unit will be sold **subject to** a \$300,000 mortgage. The association will be the successful bidder and it will rent the unit out until the lender forecloses its superior lien. The association cannot await the unpredictable behavior of lenders.

In addition to the fact that an open house will not yield money for the owner being foreclosed or for any creditor, it is also true that the task force proposal depends on the unlikely prospect of cooperation by the owner. Keep in mind that when a court appoints a foreclosure **commissioner** to hold an open house the commissioner is an officer of the court who is both subject to the control of, and protected by, the court. The pool of commissioners is also selected by the court.

In contrast, the task force notion is that some non-court officer will hold an open house. That is an opportunity for conflict and debate at minimum. It is also an opportunity for claims to be made. It is easy to imagine allegations that property is missing following an open house. It would also be prudent to consider the prospect that an assault of some kind might occur in that setting.

The open house requirement would add no value to a consumer in the association context. It would simply enable the potential for claims and conflict.

With respect to the payment plan language in the task force proposal, it is conflicting and ambiguous. The task force evidently tried to paper over differences between the members by leaving the useless "some amount" requirement and a twelve-month period. Which is it?

"Some amount" renders the remedy basically worthless, because it means \$1.00 per month for a thousand months. A definite period is appropriate.

Honorable Robert N. Herkes Honorable Gilbert S.C. Keith-Agaran January 23, 2012 Page 4 of 5

CAI recommends ten percent of the delinquency per month. Moreover, the owner should be required to tender the first ten percent payment in order to commence the payment plan option. It is not enough for the owner to merely claim that a payment plan will be performed in the future.

The task force proposes to change essential law in existence for decades to eliminate any effective remedy to collect fines, penalties and late fees. Current law is structured on a pay first, dispute later basis. That is, for example, why Hawaii Revised Statutes section 514B-146(c)(4) provides: "That under Hawaii law, a unit owner has no right to withhold assessments for any reason[.]"

It is easy to understand that no one will pay fines, penalties and late fees if the association lacks an effective remedy to collect them. Existing law is properly structured. Pay first, dispute later. The task force proposal reflects a lack of appreciation for the legitimate needs of self-governing associations to be able to enforce their project documents.

The task force also proposes that liens should expire. The rationale for such a provision is not obvious. In all events, if an expiration period is to be considered, then it should match the six-year statute of limitations for contract claims.

Concerns about unfair and deceptive trade practice liability are well known by now. CAI shares such concerns and asserts that the misdeeds of lenders should not be ascribed to associations.

This testimony merely samples the various and sundry difficulties that can be perceived in the task force proposal. Some problems seem to reflect carelessness.

The task force, for example, imports the concept of loan acceleration into the association context where it lacks relevance. That sort of error reflects that the task force may have simply copied procedures designed for lenders with little thought for the substantial differences between the for-profit lending industry and the non-profit function that associations serve.

Honorable Robert N. Herkes Honorable Gilbert S.C. Keith-Agaran January 23, 2012 Page 5 of 5

The task force proposal is replete with such vulnerabilities. CAI has put forward a more cogent proposal.

Very truly yours,

hilip S. Nerney

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 10:17 AM

To: CPCtestimony

Cc: Cheryl@certifiedhawaii.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Cheryl Jepsen Organization: Individual

E-mail: Cheryl@certifiedhawaii.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 11:46 AM

To: **CPCtestimony** J55547@AOL.COM Cc:

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: JOE ALMEIDA Organization: Individual E-mail: J55547@AOL.COM Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 11:47 AM

To: CPCtestimony

Cc: poohbear_melody@yahoo.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Melody R Nakamura

Organization: Individual

E-mail: poohbear_melody@yahoo.com

Submitted on: $1/\overline{2}4/2012$

Comments:

As a board member of Foster Heights Villas this bill does not allow Associations any recourse on people who " disappear" or hide.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 11:52 AM

To: CPCtestimony

Cc: s_meyer143@hawaiiantel.net

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Sandra Meyer Organization: Individual

E-mail: s meyer143@hawaiiantel.net

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 11:54 AM

To: CPCtestimony

Cc: jadean@touchstoneproperties-hawaii.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Jadean DeCastro Organization: Individual

E-mail: jadean@touchstoneproperties-hawaii.com

Submitted on: 1/24/2012

Comments:

As a property manager who handles multiple accounts, this bill would unduly delay the process to get the Association to secure their interest. When an owner, regardless of where they live (owner occupant vs. investor) stops paying their maintenance fees, it burdens all the other owners unfairly who are paying. I have seen this problem with in particular one owner who " disappeared" or who flat out refuses to accept service. For over 3 years, this owner has not paid a cent in maintenance fees, two separate special assessments, late fees, legal fees, etc. and has amassed over \$43,000 that is owed to a single Condominium Association.

I am opposed to this bill. We must remember that we aren't trying to unfairly foreclose on paying owners, but are trying to have a way to foreclose on those in a timely manner who aren't paying, have been given numerous notices of delinquency, etc. Please kill this bill.

Sincerely,

Jadean D. K. DeCastro

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 11:56 AM

To: CPCtestimony
Cc: atse@hawaii.edu

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Alice Tse Organization: Individual E-mail: atse@hawaii.edu Submitted on: 1/24/2012

LAW OFFICE OF GEORGE J. ZWEIBEL 45-3590A Mamane Street Honoka'a, Hawaii 96727 (808) 775-1087

House Committee on Consumer Protection & Commerce House Committee on Judiciary

Hearing: Wednesday, January 25, 2012, 2:00 p.m.

Conference Room 325, State Capitol, 415 South Beretania Street

IN SUPPORT OF HB 1875

Chairs Herkes and Keith-Agaran, Vice Chairs, and Committee Members:

My name is George Zweibel. I am a Hawaii Island attorney and have for many years represented mortgage borrowers living on Oahu, Hawaii, Kauai and Maui. Earlier, I was a regional director and staff attorney at the Federal Trade Commission enforcing consumer credit laws as well as a legal aid consumer lawyer. I have served on the Legislature's Mortgage Foreclosure Task Force ("Task Force") since its inception in 2010, although the views I express here are my own and not necessarily those of the Task Force.

HB 1875 would implement the 2011 recommendations of the Task Force. In particular, these include amendments to § 667-60, which currently declares that any violation of chapter 667 also constitutes an unfair or deceptive act or practice ("UDAP") under § 480-2. This provision is of fundamental importance because it provides a strong deterrent to violating the foreclosure law as well as a meaningful remedy if violations do occur. The recommended amendment is a direct response to lenders' concern that the current language may subject them to unfair liability for very minor violations.

In general, I support the Task Force recommendations, which mostly fine tune existing law as amended by Act 48. However, some additional revisions would be highly beneficial, while other changes that have been proposed would not. Accordingly, I respectfully submit the following recommendations, which are more fully discussed below:

Recommendations

- (1) Simultaneously enact all recommended Task Force revisions to § 667-60 (UDAP).
- (2) Retain use of FDIC loan modification guidelines in foreclosure dispute resolution.

- (3) Repeal sunset of foreclosure dispute resolution program.
- (4) Eliminate requirement that borrower choose between dispute resolution and conversion.
 - (5) Retain mortgagee liability for oral misrepresentations.
- (6) Retain prohibition against completing foreclosure while a loan modification is being considered or after one is approved.
- (7) Repeal Part I of Chapter 667 to the extent it concerns nonjudicial foreclosure.
- 1. Foreclosing mortgagee liability. By declaring that a chapter 667 violation constitutes a UDAP under § 480-2, § 667-60 deters violations and at the same time provides remedies if they do occur. This helps prevent wrongful foreclosure, e.g., when servicers make mistakes or fail to honor loan modification agreements, and ensures that important borrower rights are honored, including dispute resolution and conversion of nonjudicial to judicial foreclosures. Lenders state that § 667-60 may result in the imposition of disproportionate penalties for "miniscule" violations of chapter 667. In response, the Task Force is recommending various "safe harbors," e.g., providing a public information notice for complying with § 667-41 and clarifying where foreclosure notices must be published. The Task Force also recommends limiting the applicability of § 667-60 to chapter 667 violations that are most likely to result in wrongful foreclosure and/or financial harm. Voiding a transfer of title under § 480-12 would be further limited to the most serious of these violations, and a court action seeking such relief would have to be filed within 180 days. The Task Force's recommended revision of § 667-60, approved by 13 of the 17 voting members, reflects substantial compromise and strikes a fair and reasonable balance between lenders' stated concerns regarding liability for minor violations on the one hand. and the need to protect borrowers from real harm caused by serious chapter 667 violations on the other.
- 2. <u>Use of FDIC loan modification guidelines in foreclosure dispute</u> <u>resolution</u>. Section 667-80(e) mandates use of the calculations, assumptions and forms established by the Federal Deposit Insurance Corporation loan modification program (or a different program or process if the parties and neutral agree). The Task Force considered but rejected recommending removal of the specific reference to the FDIC guidelines, because that program is widely recognized as the most objective, transparent and verifiable loan modification program in widespread use. Retention of the FDIC language in § 667-80(e) will help avoid mistakes and ensure that the "net present value" calculation accurately determines whether it is more beneficial for the loan holder to modify the loan or to foreclose. Conversely, its deletion would seriously undercut the

dispute resolution program's ability to achieve its intended goal.

- 3. Sunset of dispute resolution program. Under Act 48, the dispute resolution program currently is scheduled to end on September 30, 2014. Although the program has been available since October 1, 2011, mortgagees have stopped doing nonjudicial foreclosures in Hawaii, claiming they face undue risk of liability under § 667-60. Consequently, mortgagees' decision to stop doing nonjudicial foreclosures will reduce to considerably less than the intended three years the period during which dispute resolution is actually available. On the other hand, by facilitating negotiations between owner-occupants and mortgagees to determine whether a loan modification or other agreement avoiding nonjudicial foreclosure is possible, the dispute resolution program will benefit homeowners and loan holders alike for as long as it operates. For these reasons, the sunset provision in Act 48 should be repealed.
- 4. Requiring borrowers to choose dispute resolution or conversion. Foreclosure dispute resolution and converting a nonjudicial foreclosure to a judicial foreclosure are both extremely important rights. However, they serve different purposes and borrowers should not be forced to choose between them. Conversion allows borrowers to assert legal claims and defenses in a court of law which, if established, may prevent a wrongful foreclosure and afford other relief. In contrast, dispute resolution creates a process and forum for determining whether foreclosure can be avoided by reaching a mutually beneficial agreement, e.g., by modifying loan terms. Alternative dispute resolution should be encouraged, but not at the cost of losing the conversion right if an agreement cannot be reached.
- 5. Oral misrepresentations. Lenders have proposed amending § 667-59 so that foreclosing mortgagees would be bound only by written agreements and representations made on their behalf. Consumer protection law enforcement agencies and private consumer attorneys have long recognized that most misrepresentations are made orally and not put into writing, making them much easier to deny later. Contrary to general rules of evidence, proof of oral misrepresentations usually is permitted to establish UDAP or fraud claims. Lenders' proposed change would eliminate foreclosing mortgagees' legal responsibility for all oral misrepresentations made by their representatives. There can be no justification for giving anyone a "license" to commit fraud, especially when families' homes are at stake.
- **6.** Foreclosing during consideration or after approval of loan modification. Lenders have proposed repealing § 667-56(6) and (7), which prohibit completing a foreclosure during loan modification negotiations or after acceptance into a federal loan modification program. There have been many instances in which mainland servicers have completed foreclosures while loan modifications were being considered or while trial or permanent modifications were in effect. Retaining § 667-56(6) and (7) is essential to protect Hawaii

homeowners from such abuses and the harm they cause.

7. Repeal of Part I nonjudicial foreclosure. When the moratorium on using nonjudicial foreclosure under Part I of chapter 667 expires, Hawaii will again have two different nonjudicial foreclosure laws. With the changes made by Act 48 and the current Task Force revisions, Part II will incorporate the best efforts of all to craft a fair and effective nonjudicial foreclosure law. There is no reason for Part I to continue to apply to owner-occupant foreclosures and those provisions should be repealed. The judicial foreclosure provisions could still be retained in Part I.

Thank you for your consideration of my testimony.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 12:21 PM

To: CPCtestimony

Cc: tc01@hawaii.rr.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Thomas Chenchar
Organization: Individual
E-mail: tc01@hawaii.rr.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 12:33 PM

To: CPCtestimony

Cc: m_tanaka@hawaiiantel.net

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: M Tanaka Organization: AOAO

E-mail: m tanaka@hawaiiantel.net

Submitted on: 1/24/2012



January 23, 2012

Representative robert Herkes, Chair Representative Ryan Yamane, Vice-Chair Committee on Consumer Protection & Commerce Representative Gilbert Keith-Aragan, Chair Representative Karl Rhoads, Vice-chair Committee on Judiciary State Capitol Honolulu, HI 96813

VIA E-Mail: CPCtestimony@capitol.hawaii.gov

Re: H.B. No./875/OPPOSE - Relating to Foreclosures

Hearing: Wednesday, January 25, 2012, 2:00pm Conf Room 325

Dear Chars Herkes and Keith-Aragan,, Vice-Chairs Yamane and Rhoads, and Members:

My name is Eric Matsumoto, Vice-President of the Mililani Town Association (MTA). I have served in MTA leadership capacities on the board for 25 of the last 32 years. MTA encompasses 16,000 plus units involving both single family residences and numerous townhouse project sub-association members.

We oppose this measure for the following reasons:

- 1. Associations are non-profit organizations established for the benefit of the homeowners in the community. Associations are significantly different from mortgage lenders as we do not choose our member homeowners, nor do we underwrite risk.
- 2. Assessments are collected from each homeowner based on the cost to manage and operate the association, the common areas and facilities. There is no profit intent as with mortgage lenders. When situations arise where assessments are not paid, the shortage is made up by the other homeowners who must pay not only their fair share but also for those who have not. The longer assessments are not paid, the longer the burden must be borne by the other homeowners.
- 3. Non-judicial foreclosures for associations need to both protect the consumers but also efficient for associations to utilize the process, unlike Section 667-I which negatively impacts associations and Section 667-K(b) under which associations would suffer.
- 4. The "personal service" requirement is a hindrance to when the foreclosed homeowner cannot be found, which precludes the foreclosure from proceeding n a timely manner so as to enable the collection of assessments vice from the other homeowners who are ocntributingmore than their fair share.

Based on the above, we request this bill be held.

Sincerely yours,

Eric M. Matsumoto

Vice-President, Board of Directors

Cc: Sen Kidani, Rep Lee, Rep Yamane



900 Fort Street Mall, Ste. 800 Honolulu, HI 96813

phone - 808.532.0090 fax - 808.524.0092 www.rcolegal.com

January 24, 2012

The Honorable Robert N. Herkes, Chair House Committee on Consumer Protection & Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair House Committee on Judiciary

State Capitol, Room 325 Honolulu, Hawaii 96813

Re: H.B. 1875 Relating to Foreclosures Hearing: Wednesday, January 25, 2012, at 2:00 p.m.

Dear Chair Herkes, Chair Keith-Agaran and Members of the Joint Committees:

I am Michael Wong, an attorney with RCO Hawaii LLLC ("RCO Hawaii"), a law firm dedicated to the representation of the mortgage banking and default servicing industry. Our firm provides a wide range of services in banking and real estate law to more than 200 large and small companies located in several Western states, including Alaska, Idaho, Arizona, Washington, Oregon, California, Nevada and Hawaii. It also serves as retained counsel for Fannie Mae in Hawaii.

RCO submits comments regarding H.B. 1875, Relating to Foreclosures. This measure proposes to make numerous amendments to Act 48, 2011Session Laws of Hawaii, including amending the requirement that notice of a non-judicial foreclosure be published in a "daily newspaper having the largest general circulation in the county where the property is located..." (emphasis added). Prior to Act 48, both in the foreclosure laws and elsewhere in the Hawaii Revised Statutes ("HRS"), the publication of government notices only required publication in a "newspaper of general circulation."

RCO is specifically concerned regarding the proposal in this bill to revise HRS Sections 667-G(d), 667-5(a)(1)(B), 667-27(d), and 667-32 (b)(4)(E), which amend the public notice requirements of Act 48. Since the passage of Act 48, due to the inclusion of the terms "daily" and "largest," RCO has seen a dramatic increase in the costs for publishing notice on Oahu, in the largest and only daily paper available. Specifically, in a review of our publication costs in

While the Act 48 publication requirements apply only to non-judicial foreclosures, Hawaii courts have found Act 48 to be instructive, and have applied these requirements to judicial foreclosures.

Hawaii between 2008 through the end of 2011, we found that the average advertisement that cost \$800 in 2008 costs \$2,000 today. Between 2008 and 2009 there was a 1.6% increase in the cost for publishing the required notice to complete a foreclosure. Between 2009 and 2010 there was a 6.1% increase and between 2010 and 2011 (which includes the period after Act 48 was enacted), there was a 33.5% increase. This amounts to a 150% increase between 2008 and 2011.

RCO understands and appreciates that the Mortgage Foreclosure Task Force attempted to address the issues that have been created by the Act 48 publication requirement. However, we do not feel that the proposed fix goes far enough to ensure that there is fair competition for the publication of notices. Specifically, leaving the term "daily" in the bill continues to create the problem of the increase in publication rates. A daily paper is not necessarily required, particularly given that the publication notice in Act 48 is a weekly requirement.

Based upon the foregoing, RCO recommends that the bill be amended, and that the following language be included where the publication requirement is referenced:

a daily newspaper having the largest of general circulation in the specific county in which the mortgaged property lies.; provided that for property located in a county with a population of more than one hundred thousand but less than three hundred thousand, the public notice shall be published in the newspaper having the largest circulation expressly in the eastern or western half of the county, corresponding to the location of the subject property;

- (i) To be "of general circulation", a newspaper must:
 - (a) Be distributed at least weekly in the county where the property is located;
 - (b) Be distributed in the county for a minimum of six months unless interrupted by strike, natural disaster, or act of war or terror;
 - (c) Contain news of a general nature; and
 - (d) Be distributed to a minimum of one percent (1%) of the residents of the county as determined by the last census and as verified by an independent audit.
- (ii) A person may apply to the Circuit Court for an order confirming a newspaper to be "of general circulation", which the Circuit Court shall grant upon proof of compliance with Section (i) above.

This approach, which has been implemented in other states, would ensure both that a newspaper is of sufficient circulation, and that there would be an opportunity for more than one paper to compete to publish notices. This would bring more fairness to the process under Act 48 -- especially because the resulting dramatic increase in cost ultimately causes the most harm the borrower, to whom this cost is passed.

RCO understands that there may be other alternatives to accomplish public notice, and remains willing to engage in further discussion and to provide input, based upon its experiences in Hawaii and other states.

Thank you very much for the opportunity to testify regarding this measure.

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 2:13 PM

To: CPCtestimony

Cc: kennethlumlee@aol.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: Arleen P. Lum Lee

Organization: Individual E-mail: kennethlumlee@aol.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 2:17 PM

To: **CPCtestimony**

al@certifiedhawaii.com Cc:

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: Yes

Submitted by: Al Denys Organization: CAI-LAC

E-mail: al@certifiedhawaii.com

Submitted on: 1/24/2012

Comments:

Aloha,

I oppose HB1875 as written as it does not adequately represent home owner associations as they are not seperated from lender issues. Associations are nonprofit organizations and are not lenders. I support SB2442 as that better protects the condo/association consumer. Mahalo.

warmest aloha,

Al Denys

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 2:30 PM

To: **CPCtestimony**

Cc: janet.boschee@gmail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Janet Boschee Organization: Individual

E-mail: janet.boschee@gmail.com

Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 2:51 PM

To: CPCtestimony

Cc: eleiter@prodigy.net

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: elliot leiter Organization: Individual E-mail: eleiter@prodigy.net Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 3:31 PM

To: CPCtestimony

Cc: rjkukui@yahoo.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Richard J. Kanemoto

Organization: Individual E-mail: rjkukui@yahoo.com Submitted on: 1/24/2012

Comments:

If I understand this bill correctly, it would mean that owners will have no recourse of those who " disappear" or leave no forwarding contacts or address.



Telephone: (808) 536-4302 • Fax: (808) 527-8088 Mailing Address: P.O. Box 37375 • Honolulu, Hawaii 96837-0375 924 Bethel Street • Honolulu, Hawaii 96813

> Calvin Pang, Esq. President, Board of Directors

M. Nalani Fujimori Kaina, Esq. Executive Director

The Honorable Robert N. Herkes, Chair
The Honorable Ryan I. Yamane, Vice Chair
House Committee on Consumer Protection and Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair The Honorable Karl Rhoads, Vice-Chair House Committee on Judiciary

Hearing:

Wednesday, January 25, 2012, 2:00 p.m. State Capitol, Conference Room 325

In support of HB 1875 Relating to Foreclosures

Chair and Members of the Committees:

My name is Madeleine Young, representing the Legal Aid Society of Hawai'i ("LASH"). I am advocating for our clients who include the working poor, seniors, citizens with English as a second language, disabled, and other low and moderate income families who are consumers and families facing default and foreclosure on their homes. I provide bankruptcy services as a staff attorney in the Consumer Unit at the Legal Aid Society of Hawai'i. Specifically, I teach a clinic to show individual consumer debtors how to prepare and file their own petition for chapter 7 bankruptcy relief, as well as provide full representation to Legal Aid clients in bankruptcy matters. I give counsel and advice to clients on protected income sources, exempt assets, and settlement options regarding their consumer debts. I also provide legal services to clients regarding mortgage default and foreclosure matters, wage garnishment avoidance, fair debt collection practices, debt collection defense, as well as student loan, tax debt, and other consumer debt problems.

We are testifying <u>in support</u> of HB 1875 as it would strengthen protections for borrowers in the State of Hawai'i.

HB 1875 seeks to implement the recommendations of the Mortgage Foreclosure Task Force. LASH supports the general intent of the Task Force recommendations to make Act 48 and Hawai'i's foreclosure law more efficient and effective.

In order to further strengthen consumer protections in the law, LASH suggests revisions to the bill:

Under Act 48, the Mortgage Foreclosure Dispute Resolution Program (MFDR) is set to sunset on September 30, 2014. While the MFDR program was created to deal with the increasing swell of mortgage foreclosures, it makes sense to continue the program as long as distressed homeowners are being foreclosed upon via the non judicial process. The MFDR program allows owner occupants and mortgage lenders to attempt to avoid foreclosure through a face-to-face meeting thereby avoiding serious damage to the distressed homeowners, while at the same time protecting the interests of the lender. LASH suggests repealing the sunset provision of the MFDR program.

LASH suggests the concurrent repeal of Part I of Chapter 667, and enactment of the protections suggested by the Mortgage Foreclosure Taskforce. With the recommendations of the Taskforce, Part II is the more complete, more clear and more effective foreclosure statute. Once the protections and clarifications of the Taskforce are enacted, Part 1 should be repealed.

Conclusion:

For the above reasons, we respectfully request passage of HB 1875. We appreciate these committees' recognition of the need to protect consumers in the State of Hawaii and support HB 1875's attempts at doing so. Thank you for the opportunity to testify.

ANDERSON LAHNE & FUJISAKI LLP

A Limited Liability Law Partnership

733 Bishop Street, Suite 2301 Honolulu, Hawai`i 96813 Telephone: (808) 536-8177 Facsimile: (808) 536-4977

January 24, 2012

Of Counsel Joyce Y. Neeley

M. Anne Anderson Philip L. Lahne Lance S. Fujisaki

> Pamela J. Schell Randall K. Sing James F. Evers Jana M. Naruse Jennifer B. Lyons

The Honorable Robert N. Herkes, Chair Committee on Consumer Protection & Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair Committee on Judiciary

RE:

BILL: HB1875, Section 2 DATE: January 25, 2012

TIME: 2:00 p.m.

PLACE: Conference Room 325

Opposed

Dear Congressman Herkes, Congressman Keith-Agaran and Members of the Committees:

This testimony is submitted on my behalf as a member of the Hawai'i State Bar Association and as the lawyer for many planned community associations. I believe I am very qualified to testify on this issue. I have twice written the article for the Hawai'i State Bar Association entitled "Community Associations" in its periodic 3 volume publication: Hawaii Real Estate Law Manual Vol. II. I have also written and taught the GRI course for Realtors® in Hawai'i for the Hawai'i Association of Realtors® and for its various statewide boards. During that time, I have served and testified on behalf of the HSBA Subcommittee on Community Associations (part of the Real Property Section) and on the Legislative Action Committee for CAI for which I have also testified. I have been selected by my peers over the last few years as one of the "Best Lawyers in America." I have practiced community association law for more than 30 years in Hawai'i.

As you know, the common expense assessments fund the operation and administration of planned community associations. Such associations represent a significant portion of housing available in Hawaii, especially low income housing. Those associations depend upon the timely payment of common expense assessments by all members. Planned community associations provide important services to all members, including, without limitation, the maintenance and repair of roadways, parks, recreational facilities and sewer easements. The purchase of insurance, security services, management services, landscaping services and other required products and services are also funded entirely by common expense assessments.

If planned community associations did not pay these charges for roadways, parks, private sewer systems, etc., those costs would fall on Hawai'i taxpayers. Thus, it is in the public interest that planned community associations be maintained on a sound financial footing. Such associations are also very important to the overall housing market in Hawaii. As much as 50% of the housing in Hawaii is estimated to be in these associations.

An alternative power of sale foreclosure remedy for associations, distinct from remedies available to mortgage creditors or banks, is appropriate in light of the non-profit nature of condominium associations and planned community associations. Although I support separate legislation for all community associations and have many concerns with the process as it affects associations in Hawai`i, I plan to limit my testimony to Section 2 of the task force bill because it includes numerous errors of law and of fact, is constitutionally infirm and will devastate planned community associations in Hawai`i.

Planned community associations should be treated differently than banks when it comes to collecting assessments and foreclosing a lien on the unit for many reasons:

- 1. Planned Community Associations, unlike banks, are non-profit. They are simply a pass-through mechanism for owners of units to pay essential bills, like electricity, water, liability and property insurance, maintenance of common areas and in some cases the exterior of units, security costs, landscaping costs, painting, re-roofing and other regular maintenance, management fees and the mandated statutory reserve funds for condominium associations. (Planned community associations do not have a statutory mandate for reserves but typically have a documentary mandate to keep reserves if they have any structures or roadways or easements to maintain.)
- 2. Planned Community Associations, unlike banks, have no opportunity to "screen" buyers of units to ensure that the buyer can pay the amount of current and future assessments. Banks are able to obtain unlimited amounts of financial information including credit reports, tax returns, employment information, on the applicant buyer and have the right to say "no" if the bank believes the applicant cannot pay its loan costs (but banks in Hawaii have little or no motivation to worry about whether buyers can pay assessments due to Condominium Associations because the law is currently written to protect banks and not Planned Community Associations). Planned Community Associations never have financial information from the prospective buyer or any involvement in the decision whether to allow the buyer to buy the unit.
- 3. Planned Community Associations, unlike banks, do not simply suffer a loss of profit absent collection of delinquencies. A shortfall in the budget of a planned community association will result in that shortfall being paid by all other unit owners (members) of the Planned Community Association. Shareholders of the bank are very unlikely to be affected or affected in the same manner as those unit owners in an association who pay their bills. Non-delinquent owners are

affected in a very direct and negative manner absent collection. They will be faced with a special assessment or an increase in the monthly assessments for any shortfall in the budget.

- 4. Planned Community Associations typically pay the cost of maintaining the collateral for the bank. The costs of exterior maintenance, electricity, water, landscape maintenance, security, management fees and other day to day charges are often paid out of the operating funds of the Planned Community Association. However, because in most instances, Planned Community Associations are subordinate to at least the first mortgagee at a foreclosure auction, the owners of other units in the Association and not the bank will pay those costs to ensure the collateral is maintained. Banks are much more likely to be promptly paid some significant amount of their debt at auction given the current state of the law than planned community associations. And, if banks do not recover at auction, it should be their responsibility as they procured the services of the appraiser who valued the unit and they evaluated the ability of the unit owner to pay monthly mortgage fees, real property taxes and insurance premiums on the property. The banks have all the information and make all the decisions that Planned Community Associations must then live with.
- 5. Even though an owner of a unit in a Planned Community Association is only a few months delinquent, banks always have the power of acceleration of the entire debt in the note secured by the mortgage and generally then are owed hundreds of thousands of dollars of debt which justify the high court costs and lengthy period of time of a judicial foreclosure. This is not true with Planned Community Associations. An owner in a Planned Community Association who is a few months delinquent and causing a serious shortfall in the annual budget (which is being paid by other unit owners during the delinquency) will not typically owe hundreds of thousands of dollars, thus making judicial foreclosure a less attractive or even impossible option for many associations. At one point, a calculation was performed of the amount of time that the largest Planned Community Association in Hawaii would have to wait until the estimated court costs of a typical judicial foreclosure (e.g., attorney's fees, costs of service, costs of filing) would be equal to the delinquency. That calculation totaled 40+ years. Thus, it is essential that Planned Community Associations have their own, straight forward foreclosure process that provides due process to the unit owner but does not bankrupt the Association in collection costs.

The task force bill makes little effort to distinguish between the collection abilities of associations and those of banks. While my primary testimony is with regard to the serious legal problems of Section 2 in the task force bill on HRS Chapter 421J or on Planned Community Associations, I also am against combining the remedies of banks with the remedies of associations for delinquent members. The purpose of a bill for associations (which are themselves "consumers" as previously recognized and defined by this legislature in the Hawai`i statute on unfair trade practices) should be to provide an effective and efficient alternative power of sale foreclosure remedy for associations that attends to the reasonable needs of all consumers

who own units governed by an association which is itself, unlike a bank, a consumer. This bill, primarily drafted by bank attorneys, would destroy the existing priority of many planned community associations, delay those associations from collection of assessments, eliminate altogether the right of associations to collect if they don't or can't do so within 2 years while allowing banks to collect during the entire period of the mortgage (e.g., 15 or 30 years). Planned community associations need a bill of their own. It is my understanding that one has been introduced.

Section 2 - 421J-A Association Fiscal Matters; Lien for Assessments.

The following is my detailed testimony on the specifics of Section 2. The drafter of this provision was apparently not familiar with the governing documents of planned community associations or with Chapter 421J which governs Planned Community Associations.

Unlike Chapter 514B which is the basis for creation of condominiums who all have the • (a) same statutory lien priority, planned community associations do not require a statute to exist and have been around much longer than condominiums and generally have very different lien priorities in their governing documents than the banks are attempting to legislate. For example, one of the largest master resort community association in the State has priority over all but first mortgages and collects its assessments from either the Condominium Associations which form part of its membership or from the members. Many of the planned community associations in this state are given priority over all but the first mortgage. Ko Olina Community Association, Inc., Queens Gate Community Association, Na Pali Haweo Community Association, Napilihau Community Association, Hoakalei Resort Community Association, and Kauai Beach Resorts are a few examples I obtained in a short time looking at public records (e.g., the Declaration). This Section would completely reverse these governing documents that apply to a large segment of the population of Hawaii. This piece of legislation is constitutionally infirm as it attempts to make all planned community associations accept a priority below all mortgage lenders and below all condominiums which is not necessarily true. Courts are likely to hold that this part of the legislation is an unreasonable impairment of contract under the state and/or federal constitution.

Planned community associations need the priority given to them by developers to maintain private roadways, private parks and other infrastructure that would otherwise have been the obligation of the taxpayers of Hawaii. Thousands of home buyers purchased their residences with the notion that the lien of the planned community association would be above that of first mortgagees. This would put planned community associations like Ko Olina Community Association, Inc., Queens Gate Community Association, Na Pali Haweo Community Association, Napilihau Community Association, Hoakalei Resort Community Association, Kauai Beach Resorts and many, many others in

a far less effective position insofar as the priority of their liens are concerned. The planned community association should be entitled to the lien provided for in its governing documents not some artificial "one size fits all" priority adopted to protect banks.

- (a) The expiration date of the lien is also very problematic. Many community associations file a lien and (because of the small amount accruing) they do not foreclose for a lengthy period of time especially if a lender is foreclosing ahead of them. This language would purportedly deprive community associations of two years of maintenance fees from delinquent lenders simply because the association was not able to finish foreclosure in that period of time. If, for example, an association waits one year to file and it takes one year to finish, the association would lose the lien for all of the amounts previously due. That is a ridiculous provision. The banks would have an association lien expiring in 2 years from the date of recordation while they continue to enjoy at least 6 years from a default. Two years is much too short. If you were to file a judicial foreclosure action, the likelihood is that a lien would expire even before you completed the action. Six years (the statute of limitations for contract claims) is more fair and acceptable.
- (a) Community association liens often provide that fines, penalties or late fees comprise part of their lien because that is what their governing documents state. Why should the lenders be permitted to deprive the community associations of this right given by their governing documents of that very effective collection tool if it is permitted in their governing documents. Because of the small amount of many community association liens, late fees are essential to collection. Recognizing the importance of fines, this legislature has provided in Chapter 514B that all condominium association boards can fine as long as due process is provided.
- (a) It is interesting to note that when the provisions of the governing documents would act against planned community associations, the lenders are anxious to include it in this law which is patently unfair to these large master associations. For example, Section 421J-A, in the next to the last sentence, would preclude planned community associations from bidding at an auction unless if it is not permitted by their governing documents. Contrast this with condominiums. Condominiums have this right by statute. See §514B-146, HRS. Thus, the lenders are happy to allow the planned community association liens to be lowered in priority even if this is totally inconsistent with the governing documents purchasers relied on upon purchase of the unit but will enforce the governing documents if it hurts planned community associations and their members --precludes them from bidding at the auction.
- (b) This part of Section 2 would again allow second, third or fourth mortgagees to gain priority over the non-profit entity which is maintaining the value of the unit the

roadways, the sewer easements, the landscaping, the security, the insurance and the many other tasks planned community associations MUST undertake. This provision would state that the mortgage that "the acquirer of title [the bank] and the [bank's] successors and assigns shall not be liable for this share of the assessments by the association chargeable to the unit that became due prior to the acquisition of title. In many, many planned community associations in Hawaii which are home for many of its residents, the Association's lien would take priority over all mortgages except first mortgages (See earlier discussion). This provision would completely destroy the governing documents of those planned community associations with regard to this important issue. The legislature should defer to the governing documents of the Association which is what the mortgage lenders and buyers were provided with during the sale and not attempt to impose a unilateral change in priority of the association's lien which is, of course, supported by the banks.

- (b)4 Item 4 is again, a proposal simply to protect banks from having to pay assessments. The residential neighbors of the delinquent unit owners will have to pay out of their own pockets for the delinquent neighbors' assessments until the bank actually takes title which could be months and months and cause a serious shortfall in association budgets. It is in the bank's and its shareholders' best interests to delay taking title as long as possible so as to avoid paying assessments. This is an anti-consumer protection law as currently drafted. Subpart (b) provides that when any person appears and objects to the form of order, the payment of the Association delinquencies is stalled. Thus, the bank itself can repeatedly appear and request continuances for the sole purpose of delaying its obligation to pay the assessments.
- (c) Subpart (c) would, contrary to common law and the statutory law that governs condominiums, permit unit owners in a planned community association to stop payment of any assessments as long as they submitted a payment plan. Thus, this provision would essentially give the unit owners in a planned community association, the right to determine their own amount of periodic payment of assessments despite what the budget of the association requires for maintenance and repair of common areas, insurance, electricity, etc. The first clause of this Subpart should be stricken. As the common law and many state laws including Hawai'i's recognize, there is no valid basis to withhold assessments. Later on the statute allows a payment plan and that would, of course override this obligation to pay in full. We should not permit owners to devise payment plans on their own whether or not they are delinquent and dictate to the planned community association how they plan to pay their share of the budget.
- (c)5 Subpart (c)(5) is simply incorrect and based on the common misapprehension that planned community associations are, in all respects, the same as condominium associations. The law requires arbitration for condominium associations but not for

planned community associations. Thus, Chapter 421J <u>includes no details whatsoever on how that arbitration would occur</u> (e.g., exemptions, judgment, arbitration service, etc.).

- (d) Subparts (c) and (d) introduce a whole new "mandatory" arbitration provision for planned community associations which have not previously been bound by this oft-criticized portion of the condominium law (that basically requires both parties to try the case twice in arbitration and, if either party is unhappy, again in court). The condominium statute at least includes a whole separate section on the arbitration, the conduct of same, the rules to be used, the service to be used, the exemptions, and many other necessary procedural rights that are missing here. The drafters simply "dumped" portions of the condo law into this Bill without any real thought as to whether it even makes sense.
- (e) In Section 2, it appears the intent is to add the condo law's 514B-146 and rent collection provisions to apply to community associations in new 421JA and B, however, in at least one section -- (a)(3), there is still a reference to "condominium" association. This shows the level of thought and concern that was put into the drafting of this bill many parts of which (not this part if the language is corrected) will seriously harm planned community associations.
- (e) Subpart (e) is incorrect as it refers to "common elements" a condominium defined term. "Common areas" is the term that should be used for planned community associations. Again, an illustration of the failure of the drafters to understand the statutes or the governing documents or to write a Bill that is even correct in its language.
- (f) Subpart (f) must be clearly understood to be a majority in attendance at a meeting. A planned community association like Mililani Town Association could not realistically expect to ever get a vote on anything by one-half of its members. Many planned community associations like MTA are comprised of tens of thousands of units and it is not feasible to depend on an amendment to its governing documents.
- (g)1 Again, subpart (g)(1) purports to change the priority of existing planned community associations. It must be recognized that if these type of provisions affect the priority of the associations' liens, there could and likely will be a successful constitutional challenge as it significantly impairs the contract of all the unit owners (e.g., the priority of the lien set out in the governing documents).
- (h) Again, the governing documents of planned community associations would be overridden with regard to the priority of the lien with regard to subpart (h). The statutory special assessment is maintained at a maximum of \$7200. However in Part IV, Section 47 (page 89), for community associations, the banks have reduced this to 6 months or \$3,600.

Thus, the law is not only poorly drafted with regard to planned community associations, it is blatantly inconsistent in material portions of the law.

Someone simply copied the condominium laws without even any reasonable proofreading. This is a sad way to draft legislation. The words "condominium" and "common elements" show up in this draft in error. A partially drafted arbitration provision was added without even any of the necessary timelines or rules as are in the condominium law. Forcing planned community associations to arbitrate is not a position this legislature has ever before accepted. Without the requisite details, planned community associations would not even know whether they could accept this very intrusive provision. At a minimum, as with condominiums, certain issues need to be omitted from arbitration. The version in the condominium law is written so as not to deprive condominium owners of the right to have their claims heard by a judge or a jury. This version should be omitted because it is being thrust upon planned community associations without any ability to consider the serious implications. For example, it is not even clear whether the right of arbitration extends beyond issues related to assessments. Arbitration should not be mandated by the legislature for tens of thousands of owners lightly and without considerable investigation. Arbitration is more expensive than a court action (you have to pay arbitrators but not judges) and, most importantly, it would deprive planned community associations and the owners therein of due process as there is no real appeal available to a community association even if the arbitrator makes serious mistakes of law and fact.

The banks' attorneys are attempting to "dump" large portions of the condominium statutory provisions into the planned community association statute without understanding the fundamental legal and statutory differences between condominiums and planned community associations. All of these provisions would have to be significantly rewritten to be acceptable to most planned community associations in this state.

- (f) Subpart (f) should be entirely rewritten to give the governing documents of the planned community associations and the applicable statute, Chapter 421J priority over these provisions. Otherwise, the law will be subject to strong constitutional impairment of contract claims. Those type of claims could not occur in condominiums in this state because of the difference between condominiums (which are always based on a statute) and planned community associations which are not.
- The court decision)

In Lee v. Puamana Community Ass'n, 109 Haw. 561, 128 P.3d 874 (2006) (Puamana is a planned community association) (Hawaii 2006), the Hawaii Supreme Court recognized

that there are fundamental differences between condominiums and planned community associations like Puamana that affect what the legislature and the judiciary can do:

Appellees' argument, however, ignores a fundamental distinction between condominium property regimes and planned community associations--that condominium property regimes are creatures of statute, whereas planned community associations are primarily creatures of common law. See Coon v. City & County Of Honolulu, 98 Hawai'i 233,252 n. 30, 47 P.3d 348, 367 n. 30 (2002) (" 'The condominium, or horizontal property regime, [was] a ... creature of statute' that was given its initial formal recognition in Hawai'i in 1961.")

(emphasis added) Our Supreme Court went on to recognize that because planned community associations did not derive their existence from legislative statutes, that Chapter 421J was not at all like the Condominium Property Act where the legislature could expected to be somewhat intrusive because the legislature had actually created condominiums. The legislature did not create planned community associations; they have been around in English common law since the 1800's. Thus, a constitutional challenge to this attempt by banks to change the priority of liens of planned community associations and otherwise override other governing documents will be treated with much greater scrutiny than similar amendments to the Condominium Property Act. The legislature created condominiums and thus is has a great deal of leeway to add to the law. But the same is not true of planned community associations. They are very different vehicles and a court is much more likely to protect the property rights (e.g., lien rights to collect delinquent assessments) of owners of units in those planned community associations.

• (g) Subpart (g) refers to "monthly" payments. Many or perhaps even most planned community associations do not collect on a monthly basis but rather a quarterly basis. I would recommend that this language be changed to read "monthly or periodically" to cover all possibilities.

PART I. GENERAL PROVISIONS

SECTION 3. Assessment is not defined in Chapter 421J, as this drafter assumes – another example of the sloppy drafting with regard to planned community associations. The bank's attorneys apparently could not even be bothered to look at Chapter 421J.

Thank you for the opportunity to submit this testimony. If you have any questions, I can be reached at 697-6006 or by email at jneeley@alf-hawaii.com.

Very truly yours,

ANDERSON LAHNE & FUJISAKI LLP A Limited Liability Law Partnership

/s/ Joyce Y. Neeley

Joyce Y. Neeley

JYN:mas

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 3:48 PM

To: CPCtestimony
Cc: kthac@aol.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325
Testifier position: Oppose
Testifier will be present:

Testifier will be present: No Submitted by: kevin thacker Organization: Individual E-mail: kthac@aol.com
Submitted on: 1/24/2012

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 10:49 PM

To: CPCtestimony

Cc: DaveMorris@my.hpu.edu

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325
Testifier position: Oppose
Testifier will be present: No
Submitted by: David Morris
Organization: Individual
E-mail: DaveMorris@my.hpu.edu
Submitted on: 1/24/2012

Comments:

Aloha! Today I received an email that appears to have originated with the Hawaii Chapter of the Community Associations Institute's Legislative Action Committee. This letter prompted me to review HB1875 as well as the 2011 and 2012 reports of the Mortgage Foreclosure Task Force.

This evening's light reading has led me to concur with the LAC's findings on several points:

- That the current bill's non-judicial foreclosure remedy adds additional costs that will likely stall the process and may leave the association holding nothing;
- That removing the ability to attach a lien for fines, penalties, and late fees renders these charges, accepted by the delinquent owner under the terms of the contract required to purchase in our neighborhood, unenforceable;
- That the conditions of payment plans should be more clearly stated and stated in a way that makes them effective at actually recovering monies owed to the association; and That a two year expiration for association liens is far too short and should be no less that six years.

As a result of skyrocketing utility expenses, our Board of Directors has had to steadily increase maintenance fees over the past few years. These fees also take care of our homeowners' insurance, landscaping and maintenance of the common areas, the community pool, and other benefits that are enjoyed by both delinquent and responsible owners.

Unfortunately, those who are responsible are carrying the added burden of those who are not in a time when expenses are already difficult to bear. Additional, unnecessary requirements make it harder to collect which drives up maintenance fees and makes it less likely that we will be able to pay our own bills. The short period that our association is able to generate rental income between non-judicial foreclosure and lender foreclosure is often the only hope that we have of recovering the expenses that my neighbors and I have shouldered before the banks come in to take their piece.

Please remember that the HOAs are merely a collection of individual homeowners and neighbors working together for a common purpose. The boards that are using these mechanisms are volunteers, homeowners who are merely trying to ensure that their neighbors who do pay their share of common expenses are not forced to pay for those who do not.

Sincerely,

David Morris Ewa Beach, HI

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Sent: Tuesday, January 24, 2012 10:23 PM

To: CPCtestimony

Cc: joannyorkgilmore@yahoo.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Comments Only Testifier will be present: No Submitted by: JoAnn York-Gilmore

Organization: Individual

E-mail: joannyorkgilmore@yahoo.com

Submitted on: 1/24/2012

- 1. Good to permit associations to terminate services provided by the HOA and access to common elements when an owner is 60+ days delinquent, but don't make it a requirement the HOA have a separate policy in place to enforce this.
- 2. Same with requiring tenant/renter to pay association fees directly to HOA/management company if the owner is delinquent. The law should be sufficient to enforce this.

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Sent: Tuesday, January 24, 2012 8:38 PM

To: CPCtestimony

Cc: shagager@gmail.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Stefani Haga Organization: Individual E-mail: shagager@gmail.com Submitted on: 1/24/2012

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Sent: Tuesday, January 24, 2012 8:08 PM

To: CPCtestimony

Cc: wrightm002@hawaii.rr.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Mark Wright Organization: Individual

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Submitted on: 1/24/2012

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Sent: Tuesday, January 24, 2012 7:00 PM

To: CPCtestimony

Cc: tomh@commercialroofinginc.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose
Testifier will be present: No
Submitted by: Thomas E Holland
Organization: Makakilo Cliffs AOAO
E-mail: tomh@commercialroofinginc.com

Submitted on: 1/24/2012 .

mailinglist@capitol.hawaii.gov [mailinglist@capitol.hawaii.gov]

Sent: Tuesday, January 24, 2012 6:43 PM

To: CPCtestimony

Cc: hisaokag001@hawaii.rr.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Gary Hisaoka Organization: Individual

E-mail: hisaokag001@hawaii.rr.com

Submitted on: 1/24/2012

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Sent: Tuesday, January 24, 2012 6:43 PM

To: CPCtestimony

Cc: josephbean@clearwire.net

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Joseph W. Bean Organization: Individual

E-mail: josephbean@clearwire.net

Submitted on: 1/24/2012

Comments:

Please, get this dangerous bill out of the way and take time to seriously consider the bill proposed by the condo association Legislative Action Committee. Please.

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law P.O. Box 4109 Honolulu, Hawaii 96812-4109 Telephone No.: (808) 521-8521

Fax No.: (808) 521-8522

January 25, 2012

Rep. Robert Herkes, Chair
and members of the House Committee on Consumer Protection & Commerce
Rep. Gilbert Keith-Agaran, Chair
and members of the House Committee on Judiciary
Hawaii State Capitol
Honolulu, Hawaii 96813

Re: House Bill 1875 (Foreclosures)

Hearing Date/Time: Wednesday, January 25, 2012, 2:00 p.m..

I am Marvin Dang, the attorney for the **Hawaii Financial Services Association** ("HFSA"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include Hawaii financial services loan companies (which make mortgage loans and other loans, and which are regulated by the Hawaii Commissioner of Financial Institutions), mortgage lenders, and financial institutions.

The HFSA opposes this Bill as drafted.

The purpose of this Bill is to implement the 2011 recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosures law and related issues affecting homeowner association liens and the collection of unpaid assessments.

I served as the Vice Chair of the Hawaii Mortgage Foreclosure Task Force ("Task Force") from 2010 to the present. I was a member of the Task Force as the designee of the HFSA.

This testimony is <u>not</u> on behalf of the Task Force and it is <u>not</u> in my capacity as the Vice Chair of the Task Force.

The Task Force, which was created by Act 162 of the 2010 Session Laws of Hawaii, issued its Preliminary Report to the 2011 Legislature and its Final Report to the 2012 Legislature. The recommendations in this Bill are the result of decision of the 18 Task Force members who represented diverse, and in some instances opposing, interests.

There were various issues on which the Task Force members were divided. These issues are detailed in the "minority reports" attached to the Report. Three of the 4 lender organizations on the Task Force submitted "minority reports". They are the HFSA, the Hawaii Bankers Association, and the Hawaii Credit Union League. (The Mortgage Bankers Association of Hawaii did not submit a "minority report" even though its votes on the Task Force were similar to the other 3 lender organizations.)

The HFSA "minority report" is attached for your reference as Exhibit "A". It is called "COMMENTS OF THE HAWAII FINANCIAL SERVICES ASSOCIATION ABOUT THE RECOMMENDATIONS OF THE MORTGAGE FORECLOSURE TASK FORCE."

We direct your attention to items 2(a), (b), (c) and 3 in the attached. These are issues on which the 4 lender groups on the Task Force were in the minority. We urge you to revise this Bill accordingly.

Thank you for considering our testimony.

Marin S. C. Dang MARVIN S.C. DANG

Attorney for Hawaii Financial Services Association

(MSCD/hfsa)

HAWAII FINANCIAL SERVICES ASSOCIATION

c/o Marvin S.C. Dang, Attorney-at-Law P.O. Box 4109

> Honolulu, Hawaii 96812-4109 Telephone No.: (808) 521-8521 E-mail: dangm@aloha.net

> > December 12, 2011

COMMENTS OF THE HAWAII FINANCIAL SERVICES ASSOCIATION ABOUT THE RECOMMENDATIONS OF THE MORTGAGE FORECLOSURE TASK FORCE

Act 162 (2010) designated the **Hawaii Financial Services Association** ("HSFA") as one of the organizations to be represented on the Hawaii Mortgage Foreclosure Task Force ("Task Force"). The HFSA is a trade association for Hawaii's consumer credit industry. Its members include financial services loan companies, financial institutions, and other mortgage lenders.

As the HFSA's representative on the Task Force since July, 2010, I am submitting these comments about the recommendations in the Task Force's Report to the Legislature for the 2012 Session.

- 1. The Task Force members collectively devoted innumerable hours in investigative groups and at Task Force meetings to produce the recommendations in the Report. These recommendations, if adopted by the Legislature, will improve Hawaii's foreclosure process and will revise various provisions in Act 48 (May 5, 2011) which is Hawaii's new mortgage foreclosure law. I agree conceptually with the Task Force's recommendations.
- 2. However, because of irreconcilable differences among the Task Force members, the Task Force was unable to make recommendations to correct some of the more problematic provisions in Act 48, including, but not limited to:
- a. Hawaii Revised Statutes ("HRS") Sec. 667-60, which states: "Any foreclosing mortgagee who violates this chapter shall have committed an unfair or deceptive act or practice under section 480-2." This section should be repealed. It unnecessarily subjects lenders to the liabilities in HRS Sec. 480-2 for even immaterial and nonsubstantive violations of HRS Chapter 667 (Mortgage Foreclosures). HRS Sec. 667-60 has been cited as one of the reasons why lenders decided after May 5, 2011 to foreclose judicially rather than non-judicially.
- b. HRS Sec. 667-85, which reads in part: "A neutral shall not be a necessary party to, called as a witness in, or subject to any subpoena duces tecum for the production of documents in any arbitral, judicial, or administrative proceeding that arises from or relates to the mortgage foreclosure dispute resolution program." This sentence should be repealed. A neutral in the Mortgage Foreclosure Dispute Resolution Program should not be immune from testifying if the neutral makes findings or determinations which subject a lender or a borrower to sanctions.
- c. HRS Sec. 667-59, which provides in part: "A foreclosing mortgagee shall be bound by all agreements, obligations, representations, or inducements made on its behalf by its agents including but not limited to its employees, representatives, mortgage servicers, or persons authorized by a foreclosing mortgagee or lender pursuant to an affiliate statement recorded in the bureau of conveyances pursuant to section 667-58." A foreclosing mortgagee should only be bound by "written" rather than alleged oral agreements, obligations, representations, or inducements.
- 3. The Task Force split evenly on (and accordingly did not adopt) my motion that the Task Force recommend to the Legislature that "mortgagees [lenders] be allowed to continue to have the option to initiate non-judicial foreclosure actions under HRS §667-5 of Part I of HRS Chapter 667 when the moratorium in Act 48 (Section 40) ends on July 1, 2012." The Part I non-judicial foreclosure process should continue to exist as a viable alternative to the Part II non-judicial foreclosure process now that Act 48 strengthened consumer protections in Part I. In this regard, Act 48: (a) requires that Part I foreclosure notices be served at least 21 days before the auction date, (b) specifies that the service of the notice be in the same manner as serving civil complaints, (c) enables an owner-occupant to convert a Part I non-judicial foreclosure or to elect dispute resolution under certain circumstances, and (d) prohibits a lender in a Part I non-judicial foreclosure from pursing a deficiency against certain owner-occupants.
- 4. Because of the increasing costs being charged by certain newspapers of daily circulation in Hawaii to publish notices of judicial and non-judicial foreclosure auctions, a statutory alternative that should be considered by the Legislature is to allow these notices to be posted on a centralized website maintained by a state government agency.

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Sent:

Tuesday, January 24, 2012 5:22 PM

To:

CPCtestimony

Cc:

moh@hawaiirealtors.com

Attachments: 01-25-12 HB1875 MFTF Recom~1.pdf (27 KB)

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Comments Only Testifier will be present: Yes

Submitted by: Brian Benton

Organization: Hawaii Assn. of Realtors

E-mail: moh@hawaiirealtors.com

Submitted on: 1/24/2012

The REALTOR® Building 1136 12th Avenue, Suite 220 Honolulu, Hawaii 96816 Phone: (808) 733-7060 Fax: (808) 737-4977

Neighbor Islands: (888) 737-9070 Email: har@hawaiirealtors.com

January 25, 2012

The Honorable Robert N. Herkes, Chair House Committee on Consumer Protection & Commerce

The Honorable Gilbert S.C. Keith-Agaran, Chair House Committee on Judiciary State Capitol, Room 325 Honolulu, Hawaii 96813

RE: H.B. 1875, Relating to Foreclosures

HEARING: Wednesday, January 25, 2012, at 2:00 p.m.

Aloha Chair Herkes, Chair Keith-Agaran, and Members of the Joint Committees:

I am Brian Benton, Government Affairs Committee Chair, here to testify on behalf of the Hawai'i Association of REALTORS® ("HAR"), the voice of real estate in Hawai'i, and its 8,500 members. HAR submits comments regarding H.B. 1875, which implements the recommendations of the mortgage foreclosure task force to address various issues relating to the mortgage foreclosure law and related issues affecting homeowner associations.

We sincerely appreciate the efforts of the Mortgage Foreclosure Task Force to make recommendations regarding the existing foreclosure law in Hawaii. However, the Hawai'i Association of REALTORS® (HAR) has concerns that some of these recommendations may create unintended adverse consequences if they become law.

Moratorium on Non-Iudicial Foreclosures

HAR understands that, since the enactment of Act 48, nonjudicial foreclosures have essentially stopped, and lien holders have opted to pursue the more costly and lengthy judicial foreclosure route. This issue appears to be linked, in part to the stringent Unfair or Deceptive Acts and Practices (UDAP) provisions in Act 48. The mortgage industry and even Fannie Mae have cited UDAP as one of the primary reason for noncompliance with the legislative intent of Act 48. Until certain UDAP provisions that apply to non-judicial foreclosures are clarified, HAR believes that it may be prudent to continue a moratorium on Part I and even Part II non-judicial foreclosures.

HAR believes that non-judicial foreclosures should exist as a mechanism only if it fair and balanced for both the borrower and creditor. HAR believes that, in the meantime, court oversight via the judicial foreclosure process should continue to be utilized as the only available foreclosure proceeding.





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Alternate Power of Sale Foreclosures for Homeowner and Condominium Associations

HAR supports the Task Force's recommendations to adopt a new section to establish an alternate power of sale process for homeowner and condominium associations for unpaid liens and assessments. Moreover, HAR also strongly supports the expansion of the condominium foreclosure law to cover planned community associations so that planned community associations are able to obtain relief due to unpaid common assessments as a form of recovery from foreclosure.

Because associations rely heavily on their income from common assessments and maintenance fees, payment delinquencies create unexpected budgetary constraints that can result in associations not meeting their budgets for necessary expenses. Moreover, associations cover expenses for common elements and amenities that benefit all owners in a planned community -- if assessments and fees are not collected, the remaining owners may be required to make extra payments though special assessments.

Opposition to Comment 34 – 180 Day Waiting Period

Under Section 33 (page 107) of H.B. 1875, the Task Force recommends that a 180-day waiting period be implemented after a foreclosure sale, to allow the foreclosed borrower to bring forth any claims for invalidating the public auction sale. HAR has concerns that the imposition of the 180-day requirement would severely impact the ability of a bidder to be able to purchase foreclosed real estate at auction. This will discourage potential bidding from the public at large, because, among other reasons, the waiting period will make it challenging to obtain financing. Owner occupant financing usually contains a requirement that a buyer take occupancy of the property within 30-90 days of closing the loan/purchase. If a Buyer cannot occupy a property within the lenders guidelines, the loan is categorized as an "investor loan," which requires a much larger down payment and a higher interest rate.

The California civil code sections regarding bona fide purchaser protections have worked for many years and could be instructive for Hawaii. In California, the law presumes that notification requirements, the auction sale, and all other statutory requirements have been satisfied. The lender is liable for financial damages to the mortgagor if the sale is overturned, but the 3rd party bidder is protected.

If the Committees are inclined to move this bill forward for further discussion, HAR suggests that the 180 day waiting period only apply in situations where the lender takes back the property at auction with a credit bid and the 180 day period does not apply to 3rd party sale situations. In short, the California system encourages competitive bidding at the auction, fosters competition that will yield the highest possible sale price, and creates the opportunity for the homeowner who lost the property to recover funds in the event there is an overbid.

Mahalo for the opportunity to testify.



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Sent: Tuesday, January 24, 2012 5:13 PM

To: CPCtestimony

Cc: bruceh@hmcmgt.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Bruce Howe

Organization: Hawaiiana Management Co.

E-mail: bruceh@hmcmgt.com Submitted on: 1/24/2012

Comments:

We oppose HB1875 because it includes condominiums and community associations with lenders in dealing with non-judicial foreclosures when their interests are totally different. CAI/LAC has submitted a different bill (no number yet) specicically addressing non-judicial foreclosures in common interest associations which efficiently and effectively deals with the problems unique to those associations and not to lenders, while protecting the rights and offering due process protections to the property owners, as well as their neighbors who are also consumers and members of their associations.

We feel that separate treatment of these entities is essential for the continued economic viability of common interest communities.

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Sent: Wednesday, January 25, 2012 7:50 AM

To: CPCtestimony

Cc: shannon@mimhawaii.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No Submitted by: Shannon Imlay

Organization: McKeon Imlay Mehling LLLC

E-mail: shannon@mimhawaii.com

Submitted on: 1/25/2012

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Sent: Tuesday, January 24, 2012 8:25 PM

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Cc: sassylady3128@yahoo.com

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Support Testifier will be present: No

Submitted by: Lisa Reed

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Submitted on: 1/24/2012

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Sent: Wednesday, January 25, 2012 9:12 AM

To: CPCtestimony

Cc: rebeccar@moiliilicc.org

Testimony for CPC/JUD 1/25/2012 2:00:00 PM HB1875

Conference room: 325

Testifier position: Oppose Testifier will be present: No

Submitted by: Rebecca R Senutovitch

Organization: Individual

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Submitted on: 1/25/2012